FILED

UNITED STATES DISTRICT COURT

FEB 1 0 2005

FOR THE DISTRICT OF SOUTH DAKOTA

CLERK

WESTERN DIVISION

UNITED STATES OF AMERICA,

                 Plaintiff,

vs.

JOHN WATERS,

                 Defendant.

CR 04-50131

GOVERNMENT'S RESPONSE
TO DEFENDANT'S OBJECTIONS

Comes now the United States of America, through its attorneys, Michelle G. Tapken, Acting United States Attorney, and Jonathan A. Kobes, Assistant United States Attorney, and responds as follows:
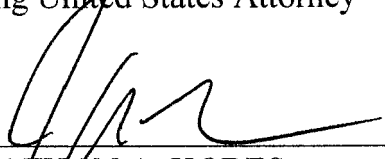
The United States does not oppose the defendant's objection to Jury Instruction Number 7 on the grounds that the United States did not allege that the defendant committed "an unlawful act not amounting to a felony." The United States does oppose omission of jury instructions 13 and 14. The elements of the offense included in the proposed jury instructions state that element 3 can be satisfied by a showing that the defendant committed the deaths of the victims "in an unlawful manner which might produce death or with wanton or reckless disregard for human life which might produce death." The government is

1

therefore required to demonstrate an "unlawful manner." Instructions 13 and 14, while defining unlawful acts, also describe "unlawful manners" in which a person might commit a lawful act. Without instruction from the court on what constitutes "unlawful" conduct, the United States will not be able to establish this element of the offense.

Dated this 10th day of February, 2005.

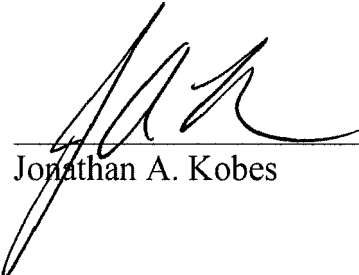MICHELLE G. TAPKEN
Acting United States Attorney
By:

_____
JONATHAN A. KOBES
Assistant U.S. Attorney
201 Federal Building, 515 Ninth Street
Rapid City, South Dakota 57701
(605)342-7822

CERTIFICATE OF SERVICE

I, Jonathan A. Kobes, hereby certify that I served a true and correct copy of the above and foregoing Government's Response to Defendant's Objections on Monica D. Thomas, Assistant Federal Public Defender, 703 Main Street, 2nd Floor, Rapid City, South Dakota, by hand delivery, this 10th day of February, 2005.

_____
Jonathan A. Kobes

2